Filed 12/12/01

NOT TO BE PUBLISHED

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. FRANZ GRUNINGER, Defendant and Appellant.	E026993 (Super.Ct.No. RIF084774) O P I N I O N
In re FRANZ GRUNINGER, on Habeas Corpus.	E030212 (Super.Ct.No. RIF084774)

APPEAL from the Superior Court of Riverside County. Robert J. McIntyre and W. Charles Morgan, Judges. Affirmed.

ORIGINAL PROCEEDING; petition for writ of habeas corpus. Petition denied.

Douglas G. Benedon, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Peter Quon, Jr., Supervising

Deputy Attorney General and Pat Zaharopoulos, Deputy Attorney General, for Plaintiff and Respondent.

After the trial court granted defendant's Penal Code section 1538.5 motion to suppress evidence, and as a result the original indictment was dismissed, the district attorney filed an information that again charged defendant with violating Health and Safety Code section 11352, subdivision (a) by transporting and possessing cocaine for sale.[1] The information further alleged a weight enhancement under Health and Safety Code section 11370.4. Defendant pled not guilty and denied the special allegation after which the case was assigned to Judge Velia Sherman, the judge who had granted defendant's suppression motion. The district attorney then filed a motion under Code of Civil Procedure section 170.6 to disqualify Judge Sherman. Judge J. Thompson Hanks granted that motion, over defendant's objection, and reassigned the case to Judge Robert McIntyre. Defendant then filed another motion to suppress the evidence but after reviewing pertinent portions of the transcript of the first hearing and taking additional evidence, Judge McIntyre denied that motion. As a result, defendant withdrew his not guilty plea and, pursuant to a plea agreement with the district attorney, entered a plea of guilty to a charge of criminal conspiracy. Defendant also admitted the weight enhancement.[2]

---

[1] Defendant has requested that we take judicial notice of the original indictment and the clerk's minute order that reflects the trial court granted defendant's motion to suppress evidence. That request for judicial notice is granted.

[2] The trial court sentenced defendant to the agreed upon term of three years in state prison plus a consecutive 25-year term on the weight enhancement.

Defendant contends in this appeal from the judgment that the trial court erroneously granted the district attorney's motion to disqualify Judge Sherman because that disqualification violated subdivision (p) of Penal Code section 1538.5. That provision requires that relitigation of a motion to suppress evidence "shall be heard by the same judge who granted the motion at the first hearing if the judge is available." (Pen. Code, § 1538.5, subd. (p).) In response to our request, the parties submitted additional briefing on the potentially dispositive question of whether defendant was required to challenge the disqualification order by filing a writ as specified in Code of Civil Procedure section 170.3, subdivision (d). Defendant also filed a petition for writ of habeas corpus alleging ineffective assistance of trial counsel.[3]

We conclude, for reasons we explain below, that defendant was required to comply with Code of Civil Procedure section 170.3, subdivision (d) and seek writ review of the order granting the motion to disqualify Judge Sherman. Defendant may not challenge that disqualification order in this appeal from the judgment. We further conclude that Penal Code section 1538.5, subdivision (p) does not embody a due process principle but instead is purely a matter of state statutory law. Consequently, even if we were to agree with defendant's allegation in his habeas corpus petition that the trial court erred in granting the prosecutor's peremptory challenge to Judge Sherman, that error would require reversal of the judgment only if it were prejudicial under the standard set out in *People v. Watson* (1956) 46 Cal.2d 818, 836. As we shall explain, it is not reasonably probable defendant

[3] We ordered the habeas corpus petition considered with the appeal for the purpose of determining whether to issue an order to show cause.

would have obtained a more favorable result if Judge Sherman had heard defendant's second suppression motion. Accordingly, we will affirm the judgment and deny the habeas corpus petition.

FACTUAL AND PROCEDURAL BACKGROUND

The pertinent facts are those developed in the course of the hearings on defendant's suppression motions. Briefly summarized, officers from several different law enforcement agencies were involved in an apparent drug surveillance in Corona. The officer in charge of that surveillance had received information from a police officer in another agency that a red Nissan pickup truck had been seen leaving a residence believed to be a cocaine stash house. When one of the officers in the surveillance team later spotted the pickup truck, it was in the parking lot of a Payless shoe store. The officer watched the driver get out of the pickup and stand in front of the shoe store for about 15 minutes after which another man, identified as Ivan Martinelli, got into the pickup and drove away.

The law enforcement officer followed Martinelli as he drove the pickup to Corona Airport. Although covered by a camper shell, the officer could see numerous boxes in the bed of the truck. At the airport, Martinelli drove to hangar number 9 but then left the airport and drove to a park across the street. Other officers watched as Martinelli met Jack Simpson in the park. The meeting lasted about five minutes after which Simpson drove his car, a green Corsica, to the airport where he parked next to hangar number 9. Not long after Simpson arrived, defendant drove up in a Cadillac and spoke briefly to Simpson. The two drove to the park where they met Martinelli. About 30 to 40 minutes later, defendant drove back to the airport. After driving slowly by hangar number 9, defendant returned to the park.

Defendant in his car, and Martinelli and Simpson in the Nissan pickup truck, then returned to hangar number 9. Defendant unlocked and opened the hangar door. When Simpson arrived in the pickup truck, he pulled into the hangar and began unloading the boxes.

One of the law enforcement officers reported seeing what appeared to be the nose of an airplane inside hangar number 9. Believing that the boxes contained cocaine and believing they were about to be loaded into an airplane, the officer in charge directed a full felony detention of defendant and the other two men in the hangar. After several minutes, the officer in charge arrived and ultimately obtained defendant's consent to search the hangar. Inside the hangar, the officer opened one of the boxes and found a large quantity of what appeared to be cocaine. The officer then arrested defendant and his companions.

DISCUSSION

1.

PENAL CODE SECTION 1538.5, SUBDIVISION (P)

Penal Code section 1538.5, subdivision (p), as previously noted, states in pertinent part that relitigation of a motion to suppress evidence shall be by the judge who granted the motion at the first hearing if that judge is available. According to the legislative history, the provision in question was added in response to criticism of the proposed 1993 amendment to Penal Code section 1538.5, subdivision (j) which, as ultimately enacted, allowed the prosecutor a second opportunity to litigate a suppression motion. California Attorney's for

Criminal Justice "(CACJ) opposed the bill 'because it would allow prosecutors to "take another shot" with another judge after losing a suppression motion in superior court. CACJ believed that the bill would encourage forum shopping . . . .' [Citation.]" (*Soil v. Superior Court* (1997) 55 Cal.App.4th 872, 878.)[4] As a result of that concern and criticism, the pertinent State Senate bill was amended several times, initially to specify "'that the intent of the Legislature, through this legislation, shall not be construed as a means to forum shop'" and eventually to include the specific language in subdivision (p) at issue in this appeal. (*Id.* at pp. 878-880.) Defendant contends that allowing the prosecutor to use Code of Civil Procedure section 170.6 to disqualify the judge who granted the original motion defeats the purpose of the quoted provision and allows the prosecutor to forum shop in direct contravention of the Legislature's stated intent.

A. Appealability

Although we are inclined to agree with defendant, we first must address the procedural question of whether defendant is precluded from raising the issue on appeal. Code of Civil Procedure section 170.3, subdivision (d) states, "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought within 10 days of notice to the parties of the decision and only by the parties to the proceeding." Defendant did not file a writ to challenge the order disqualifying Judge Sherman and contends he was not required to do so because he is asserting his claim as a violation of Penal Code section

[4] Defendant's request that we take judicial notice of the Legislative history of the 1993 amendments to Penal Code section 1538.5 is granted.

1538.5, subdivision (p). Alternatively, defendant argues that he may raise the disqualification issue as a due process claim.

Defendant's claim in this appeal is directed at the propriety of the order granting the prosecutor's exercise of a peremptory challenge under Code of Civil Procedure section 170.6. The basis for defendant's challenge is the claimed violation of subdivision (p) of Penal Code section 1538.5. The challenge itself, however, arises under Code of Civil Procedure section 170.6. The exclusive means for seeking review of a ruling granting or denying a peremptory challenge under Code of Civil Procedure section 170.6 is a petition for writ of mandate under Code of Civil Procedure section 170.3, subdivision (d). (*People v. Williams* (1997) 16 Cal.4th 635, 652; *People v. Brown* (1993) 6 Cal.4th 322, 334; *People v. Hull* (1991) 1 Cal.4th 266, 275.) As the *Hull* court observed, albeit in the context of reviewing an order denying rather than granting a peremptory challenge under Code of Civil Procedure section 170.6, ". . . 'The Legislature obviously opted for speedy review of a disqualification ruling, since permitting that ruling to be attacked later on appeal of the judgment could invalidate every ruling made by the trial court judge after the disqualification motion was denied [or, in this case, granted].' [Citation.]" (*People v. Hull*, *supra*, at p. 270, citing *People v. Jenkins* (1987) 196 Cal.App.3d 394, 403-404.)

Defendant did not seek writ review of the trial court's order granting the prosecutor's peremptory challenge of Judge Sherman. Therefore, his claim is only cognizable on appeal as a due process challenge.

B. Due Process

A due process claim based on an assertion that the judgment was "procured before an adjudicator who was biased" is not foreclosed by failure to comply with Code of Civil Procedure section section 170.3, subdivision (d). (*People v. Mayfield* (1997) 14 Cal.4th 668, 811; *People v. Brown, supra,* 6 Cal.4th at p. 335.) Defendant does not raise such a claim in this appeal. Instead, defendant contends that the procedure in this case violated due process because it enabled the prosecutor to relitigate the suppression motion before a different judge. To support his claim, defendant cites *People v. Gallegos* (1997) 54 Cal.App.4th 252, 267-268, for the proposition that the relitigation provision in Penal Code section 1538.5, subdivision (j) comports with due process and therefore is constitutional only because the provision requires that the subsequent suppression motion be heard by the same judge who granted the original motion. We do not read *Gallegos* so narrowly.

The defendant in *Gallegos* challenged the constitutionality of the 1993 amendment to Penal Code section 1538.5 that added subdivision (j), the provision that permits a district attorney to refile charges after a defendant has successfully moved to suppress evidence. The defendant asserted that the statute violated the due process clauses of both the state and federal constitutions because it gave the prosecutor a second opportunity to relitigate a suppression motion but did not afford the defendant such an opportunity and, therefore, the procedure was inherently unfair. In rejecting the defendant's claim, the *Gallegos* court noted that under both the federal and state constitutions a suppression hearing comports with the requirements of due process if the defendant has a full and fair opportunity to be heard on the claim. (*People v. Gallegos, supra,* 54 Cal.App.4th at pp. 264-265.) The court

concluded that the defendant had been afforded such an opportunity because he had not been "restricted in what witnesses could be called or what evidence could be presented at the second hearing. [The defendant] could rely upon his earlier points and authorities, or was free to file supplemental points and authorities. *[The defendant's] motion was heard by the same judge who granted [the] earlier motion, as required by section 1538.5, subdivision (p).* The same would be true as to defendants in general. [The defendant] received a full and complete hearing on his motion to suppress, which is all that due process requires." (*Id*. at pp. 267-268, emphasis added.)

Although the *Gallegos* court did cite subdivision (p) of Penal Code section 1538.5 as a pertinent factor in the analysis, the court did not hold as defendant suggests that the provision was essential to the constitutionality of the relitigation provision in subdivision (j) of Penal Code section 1538.5. Nor is such a conclusion compelled as a matter of due process.

"Procedural due process focuses upon the essential and fundamental elements of fairness of a procedure that would deprive an individual of important rights. As stated in *Fuentes v. Shevin* (1972) 407 U.S. 67 at page 80, [92 S.Ct. 1983, 32 L.Ed.2d 556]: ' . . . the central meaning of procedural due process [is] clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." [Citations.] It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." [Citation .]'" (*In re Joshua M.* (1998) 66 Cal.App.4th 458, 471.)

Defendant had a meaningful opportunity to be heard on his second suppression motion. Although a different judge heard that motion, defendant does not claim that the second judge was biased or otherwise deprived defendant of a fair and impartial hearing. Rather, defendant claims only that the procedure of allowing a judge other than the one who granted the original suppression motion to hear the second motion violates Penal Code section 1538.5, subdivision (p). Defendant has not established a due process violation, under either the state or federal constitutions, and therefore we must reject his claim.

2.

HABEAS CORPUS PETITION

As previously noted, defendant raises the violation of Penal Code section 1538.5, subdivision (p) in his petition for writ of habeas corpus. Specifically, defendant alleges that he was denied effective assistance of counsel because his trial attorney did not file a writ petition challenging the order granting the prosecutor's peremptory challenge of Judge Sherman and as a result defendant is precluded from raising the statutory violation on appeal. Our conclusion, noted above, that the statutory procedure does not serve to protect rights secured under the due process clauses of either the state or federal constitutions, eliminates the need for us to resolve defendant's substantive claim.

The procedure set out in subdivision (p) of Penal Code section 1538.5 is purely a matter of state law and does not secure rights guaranteed under the due process clause of the federal constitution. Therefore, the purported error that resulted from allowing a judge other than Judge Sherman to hear defendant's second suppression motion requires reversal of the judgment only if it is prejudicial under the standard set out in *People v. Watson*

(1956) 46 Cal.2d 818, 836. (See *Chapman v. California* (1967) 386 U.S. 18, 24, which holds that error of federal constitutional magnitude requires reversal unless the error is harmless beyond a reasonable doubt.) If we were to assume without actually deciding that Penal Code section 1538.5, subdivision (p) should be interpreted so as to preclude the prosecutor from exercising a peremptory challenge under Code of Civil Procedure section 170.6 against the judge who originally granted the suppression motion, such error would require reversal only if it were reasonably probable defendant would have obtained a more favorable result if the statutory procedure had been followed. (*People v. Watson, supra*.) In other words, reversal is required in this case only if it is reasonably probable Judge Sherman would have granted defendant's second suppression motion and, more importantly, whether that ruling would have been affirmed on appeal. We next address that issue.

In granting defendant's initial suppression motion, Judge Sherman focused on the lack of evidence regarding the content of the pickup truck and its connection to unlawful activity. The judge was of the view that, absent such evidence, the officers did not have probable cause to arrest defendant. Judge Sherman found that the law enforcement officers' action in making a "full felony stop," that is, detaining defendant at gunpoint, handcuffing him, and then placing him on the ground was tantamount to an arrest. Because that action was unlawful, Judge Sherman next considered whether defendant's consent to search the airport hangar where the cocaine was found was the product of that unlawful arrest. The judge concluded that defendant's consent was not sufficiently attenuated from the unlawful arrest and therefore was ineffective. As a result, Judge Sherman granted defendant's first motion to suppress.

At the second suppression hearing, at which Judge McIntyre presided, the prosecutor presented evidence connecting the pickup truck with illegal activity. Specifically, and as previously noted, the law enforcement officer in charge of the investigation testified in pertinent part that he had received information from another law enforcement officer indicating that the driver of the pickup truck and the truck itself were involved in cocaine trafficking. Because it was the absence of evidence connecting the pickup truck with illegal activity that prompted Judge Sherman to grant defendant's first suppression motion, if that evidence had been presented to Judge Sherman, she presumably would have denied defendant's second motion to suppress.

More importantly, denial of that suppression motion would have been the correct result. Which brings us to defendant's alternative claim on appeal, namely that Judge McIntyre incorrectly denied defendant's suppression motion because the prosecutor failed to show the basis for and thus the reliability of the information the investigating officer received regarding the truck and its driver. According to defendant such evidence was necessary under *People v. Harvey* (1958) 156 Cal.App.2d 516, *Remers v. Superior Court* (1970) 2 Cal.3d 659, and *People v. Madden* (1970) 2 Cal.3d 1017, the trilogy of cases collectively cited for the so-called *Harvey-Madden* or *Harvey-Remers-Madden* rule. Under that rule or line of cases, when law enforcement officers rely solely on information obtained from another police officer as the basis for a search or arrest, the prosecutor must establish the source, or reliability, of the other officer's information. (*Remers v. Superior Court*, *supra*, 2 Cal.3d at pp. 667.) "To hold otherwise would permit the manufacture of reasonable grounds for arrest within a police department by one officer transmitting

information purportedly known by him to another officer who did not know such information, without establishing under oath how the information had in fact been obtained by the former officer." (*Id*. at pp. 666-667.) In other words, unless the source of the first officer's information is established, that information is the equivalent of an anonymous tip. In order to support a lawful detention, or in this case arrest, an anonymous tip must be corroborated sufficiently to provide reasonable suspicion to detain, or in this case probable cause to arrest. (See *In re Eskiel S*. (1993) 15 Cal.App.4th 1638, 1644, citing *Alabama v. White* (1990) 496 U.S. 325, 331.)

This is not a case in which defendant's arrest was based solely on information obtained from another officer or other official source. As set out above, after receiving information that the truck and its driver were involved in transporting cocaine, law enforcement officers conducted an extensive surveillance of defendant and his two companions. During that surveillance they observed, among other things, the driver switch that occurred in the Payless shoe store parking lot after which the second driver drove to the airport. On the way, the second driver engaged in what was described as counter-surveillance driving, namely driving slowly with constant attention to the rear view mirror. After driving through the airport and past hangar number 9, the driver drove to a nearby park where he met a second man. About 5 minutes after arriving in the park, the second man, Simpson, drove to the airport and parked next to hangar number 9. Not long after Simpson arrived, defendant drove up in a Cadillac and spoke briefly to Simpson. The two drove back to the park where they met Martinelli. About 30 to 40 minutes later, defendant drove his car back to the airport. After driving slowly by hangar number 9, defendant returned to the

park. Defendant in his car, and Martinelli and Simpson in the Nissan pickup truck, then returned to hangar number 9. Defendant unlocked and opened the hangar door. When Simpson arrived in the pickup truck, he pulled into the hangar and began unloading boxes.

The law enforcement officers' subsequent surveillance of the pickup truck, combined with their testimony based on knowledge of and experience with drug traffickers' actions, sufficiently corroborated the information that the truck and its driver were involved in transporting cocaine or some other illegal substance. That evidence, in turn, was sufficient to lead a person of reasonable prudence to conclude that defendant was engaged in such criminal activity which, in turn, established probable cause to arrest defendant. (*Remers v. Superior Court*, *supra*, 2 Cal.3d at p. 664.) In short, Judge McIntyre correctly denied defendant's motion to suppress.

Our conclusion that Judge McIntyre correctly denied defendant's suppression motion requires us to conclude that any error in granting the prosecutor's peremptory challenge of Judge Sherman necessarily was harmless. The investigating officer's testimony at the second suppression motion hearing that he had received information from another officer that the truck was transporting cocaine would have provided the link that Judge Sherman viewed necessary to establish probable cause to arrest defendant and his companions. The existence of probable cause to arrest would, in turn, have resulted in a finding that defendant's consent to search was lawful and hence would have compelled Judge Sherman to deny the suppression motion. Accordingly, we conclude that the purported error in this case of granting the prosecutor's motion to disqualify Judge Sherman necessarily was harmless in that it is not reasonably probable defendant would

have obtained a more favorable result if Judge Sherman, rather than Judge McIntyre, had heard his second suppression motion.

For this reason we must deny defendant's petition for writ of habeas corpus. Assuming trial counsel's performance was deficient because he did not seek writ review of the order granting the peremptory challenge of Judge Sherman, defendant was not prejudiced by that deficient performance. Both deficient performance and prejudice must be established in order to prevail on an ineffective assistance of counsel claim. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 217.) Simply put, it is not reasonably probable defendant's suppression motion would have been granted and thus defendant would have obtained a more favorable result if Judge Sherman had heard that motion.

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED.

McKINSTER
Acting P. J.

We concur:

RICHLI
J.

WARD
J.